PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BEVERLY LESNICK, Individually and as Personal Representative of the Estate of Stanley S. Lesnick, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 93-1820
HOLLINGSWORTH & VOSE CO., *Defendant-Appellee,*	)	
and	)	
LORILLARD, INC., *Defendant.*	)	

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-91-3427)

Argued: May 9, 1994

Decided: September 19, 1994

Before MURNAGHAN and NIEMEYER, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Murnaghan and Judge Hilton joined.

COUNSEL

ARGUED: Howell Kenneth Rosenberg, BROOKMAN, ROSENBERG, BROWN & SANDLER, Philadelphia, Pennsylvania, for Appellant. Andrew James McElaney, Jr., NUTTER, MCCLENNEN & FISH, Boston, Massachusetts, for Appellee. **ON BRIEF:** Steven J. Cooperstein, BROOKMAN, ROSENBERG, BROWN & SANDLER, Philadelphia, Pennsylvania; Mark S. Rosen, SCANLON & ROSEN, P.A., Baltimore, Maryland, for Appellant. Stephen J. Brake, NUTTER, MCCLENNEN & FISH, Boston, Massachusetts, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

After her husband died from lung cancer, Beverly Lesnick instituted this action in the District of Maryland, alleging that the filters in Kent brand cigarettes manufactured by defendants Lorillard, Inc., and Hollingsworth & Vose Co. were the cause of her husband's death. In particular, she alleged that his death was caused by asbestos incorporated by the defendants into Kent brand cigarettes' "Micronite filter" between 1952 and 1956. Hollingsworth & Vose, a Massachusetts corporation which manufactured the filter material in Massachusetts and shipped it to Lorillard's plants in Kentucky and New Jersey, filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) on the grounds that it did not have sufficient contacts with the state of Maryland for a Maryland court to assert personal jurisdiction over it. The district court granted the motion to dismiss, and we affirm.

I

Stanley Lesnick, a Maryland resident, smoked approximately one and one-half to two packs of cigarettes each day from the 1940's until he quit smoking in the early 1970's, and he smoked Kent brand cigarettes from the time they were introduced on the market in the early 1950's until he quit. Lesnick purchased most of his cigarettes from retail stores in the state of

Maryland. In May 1989, Lesnick was diagnosed with mesothelioma, a form of lung cancer. His doctor concluded that the cancer was caused by inhalation, not of the tobacco smoke, but of crocidolite asbestos, which was incorporated in the Kent cigarettes' filters in the early 1950's. Lesnick's condition was diagnosed as fatal, and on November 21, 1989, he died.

Beverly Lesnick, Stanley's wife, filed this diversity action in December 1991 in her individual capacity and as the representative of Stanley Lesnick's estate, naming as defendants Lorillard, Inc., a New York corporation with its principal place of business in New York, and Hollingsworth & Vose Co., a Massachusetts corporation with its principal place of business in Massachusetts. The amended complaint alleged that from March 1952 to May 1956, Lorillard manufactured Kent cigarettes with the "Micronite Filter," which contained crocidolite asbestos. The filter medium was manufactured by Hollingsworth & Vose in Massachusetts and was then shipped to Lorillard's cigarette manufacturing plants in Kentucky and New Jersey where it was incorporated into the cigarettes. Between 1952 and 1956, Hollingsworth & Vose provided Lorillard with material for approximately 10 billion asbestos-containing filters which were incorporated into cigarettes marketed and distributed by Lorillard throughout the nation. In her complaint, Beverly Lesnick alleged that the defendants knew or should have known of the dangers of crocidolite asbestos at the time the cigarettes and filters were manufactured, but that they failed to make improvements in them or to warn the public of these dangers. She based her claims on Maryland theories of negligence, strict liability, fraudulent misrepresentation, negligent misrepresentation, and breach of express warranty, and she demanded $2 million in damages.

Hollingsworth & Vose filed a motion to dismiss for lack of personal jurisdiction. It recognized that Maryland authorizes long-arm jurisdiction to the full extent allowed under the Due Process Clause of the Fourteenth Amendment, *Mohamed v. Michael*, 370 A.2d 551 (Md. 1977), but it argued that under the reasoning of the Supreme Court plurality in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987),

jurisdiction may not be asserted over an out-of-state manufacturer of products placed into the stream of commerce, where the manufacturer's only connection with the forum state is its knowledge that the products will eventually be sold there. Hollingsworth & Vose acknowledged that, when it sold the material for cigarette filters to Lorillard, it placed the material in commerce knowing that it would eventually be sold in Maryland as a component of Kent cigarettes; however, it argued that under *Asahi*, mere knowledge is not enough to establish personal jurisdiction, and its activity must have been purposefully directed toward Maryland.

In support of her argument that Hollingsworth & Vose should be subject to Maryland's long-arm jurisdiction, Beverly Lesnick argued first that language in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980), which appears to require only that a defendant place a product "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum State," should control, and based on admissions from Hollingsworth & Vose, Maryland's jurisdiction over Hollingsworth & Vose is properly asserted. Even assuming that *Asahi* is read to make the standard more demanding, Lesnick argued, jurisdiction would nevertheless be proper because Hollingsworth & Vose was "no mere supplier of component parts." Rather, it "bound itself to work in virtual partnership with Lorillard to develop a filter for general distribution through integration into Lorillard's cigarettes." Lesnick contended that Hollingsworth & Vose should be imputed with Lorillard's clearly adequate contacts with Maryland because it "purposefully availed itself of the privilege of conducting business, through Lorillard's sales, in the entire United States."

The district court rejected the argument that Hollingsworth & Vose's ties to Lorillard were sufficient to establish jurisdiction, though it acknowledged that Hollingsworth & Vose was an important, perhaps even vital, supplier to Lorillard. The court stated, "Hollingsworth & Vose Company is not engaged directly, as is Lorillard, in bringing the alleged offending product into Maryland, or doing anything with respect to Maryland, other than supplying its product to defendant Lorillard in a state other than Maryland." The court granted Hollingsworth &

Vose's motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) and entered final judgment in its favor under Federal Rule of Civil Procedure 54(b). This appeal followed.

II

While the jurisprudence of personal jurisdiction has focused on fixing the minimum measurement of a person's contact with a state necessary to substitute for the person's presence in the state and thus to justify that state's imposing an *in personam* judgment over the person, the immediate concept of "presence" is no longer part of the language. Nevertheless, the establishment of a surrogate for presence has been the core task in defining the due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders. A historical review of the scope of a state's jurisdictional power thus provides an insight into the Supreme Court's efforts in articulating a standard for long-arm jurisdiction.

It remains well-established that a state's sovereignty over persons, property and activities extends only within the state's geographical borders and that therefore its laws have no operation in another state except as allowed by the other state or by comity. *See Pennoyer v. Neff*, 95 U.S. 714, 720-22 (1878). This root principle is inherent in our system of federalism. As the Court in *Pennoyer* stated:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id. at 722. The Court noted that the assertion by one state of jurisdictional power in violation of these principles would be "an illegitimate assumption of power," *id.* at 720, and would not constitute due process of law in violation of the Fourteenth Amendment. *Id.* at 733.

Preserving the notion that only a person *present* in a state can be subjected to an *in personam* judgment there, the Court later concluded that corporations, even though previously thought to be present only where incorporated, were present in states where their authorized agents conducted the corporations' activities. *St. Clair v. Cox*, 106 U.S. 350 (1882). In *St. Clair*, the Court upheld a Michigan statute that permitted a foreign corporation to be sued in the state as a condition of that corporation's doing business in the state. The Court reasoned that the corporation's presence, through its agents, constituted implied consent to be sued there in accordance with the state's statute. *See also Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917) (holding that out-of-state corporation's in-state business may be so extensive as to imply physical presence in state).

Because the articulation of the "presence in a state" necessary to personal jurisdiction over the person was too limited for the increasing demands of interstate commerce and an expanding economy, the Supreme Court eventually adopted a more flexible approach that recognized a state's jurisdictional power over a person not only when the person is present in the state, but also when the person conducts meaningful activity there even if not physically present. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958). This modern approach, which began in 1945, focuses on an out-of-state person's contacts with the forum state coupled with notions of fairness in asserting jurisdiction over that person. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957). Even though the Court in *International Shoe* recognized for the first time an expanded state power to exercise jurisdiction over a person not physically "present" there, its holding was rooted in finding a suitable analogy for the "presence" of the out-of-state party. *International Shoe* expressly relied on, and did not overrule *Pennoyer v. Neff*, noting that "the terms 'present' or 'presence' are used merely to *symbolize* those activities of the corporation's agent within the state which the courts will deem to be sufficient to satisfy the demands of due process." *International Shoe*, 326

U.S. at 316-317 (emphasis added). Establishing a theoretical structure on which to justify the minimum contacts doctrine, the Court stated,

> "Presence" in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

Id. at 317. It also noted the obverse, pointing out that the "casual presence of a corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *Id.* "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Id. at* 319. Requiring a corporation to respond to litigation arising from those activities can "hardly be said to be undue" for purposes of the Due Process Clause. *Id.* Thus, notwithstanding the physical absence of a person from the territorial limits of the state, the defendant in *International Shoe* was subject to suit there.

International Shoe leaves us with a two-pronged requirement for asserting jurisdiction over a person not present in a state. The person must (1) have certain minimum contacts or ties with the forum state such that (2) maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* at 316. Thus, while *International Shoe* expands upon the notion of "presence" to provide flexibility to accommodate the increased flow of commerce between the states, *see Hanson,* 357 U.S. at 251 (1958), the standard for imposing jurisdiction over persons outside the state has remained one that depends on a measure of the person's activity *in the state* coupled with the constraint that the state's exercise of such power would not offend traditional notions of fair play.

In the years since *International Shoe,* the Court has further refined the definition of "minimum contacts." In *Hanson,* the Court limited those "minimum contacts" necessary to confer jurisdiction to those activities of an out-of-state person by which

the person "purposely avails itself of the privilege of conducting activities within the forum state." 357 U.S. at 253. This occurs where the contacts "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state," *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (quoting *McGee,* 355 U.S. at 223) (emphasis in original), or where the defendant's efforts are "purposefully directed" at the state. *Id.* at 476. This test is not to be applied mechanically; it "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe,* 326 U.S. at 319.

These modern principles of personal jurisdiction do not, and indeed under the Constitution could not, reorder the separate sovereignties of the states. A state's jurisdictional power remains territorial, to be exercised within its boundaries over persons, property and *activities* there. Rather, these principles focus on the nature and quality of contacts with the state to determine whether they justify the state's exercise of its judicial power over the person.

Two relatively recent Supreme Court cases, without overruling the foregoing principles, have addressed personal jurisdiction issues in the products liability context with additional language that has reopened the discussion of long-arm jurisdiction's reach. In *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), a married couple who, after having purchased a new Audi automobile from a dealer in New York, were on their way to their new residence in Arizona, were involved in an accident in Oklahoma, resulting in severe injuries to the wife and the couple's two children. The couple brought suit in Oklahoma against the New York dealer and the New York distributor, claiming that design defects in the automobile contributed to the plaintiffs' injuries. While the plaintiffs acknowledged that the two New York corporations were present and did business only in New York, they argued that Oklahoma's exercise of jurisdiction over the New York corporations was appropriate because of the mobile nature of the automobile and the foreseeability that some cars these corporations sold would find their way into Oklahoma. The Supreme Court, however,

rejected the argument, ruling that the exercise of personal jurisdiction over the New York corporations by an Oklahoma court would violate the Fourteenth Amendment. It reached this conclusion because the New York corporations directed no activity to Oklahoma. As the Court said,

> [they] avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market.

444 U.S. at 295. While this reasoning, focusing upon the defendants' actual contacts with Oklahoma, is consistent with the Court's earlier jurisprudence, the Court elsewhere discussed the type of foreseeability which is critical as an element of minimum contacts. Rejecting the notion that foreseeability based on a "mere likelihood" that a product would find its way to the forum state could establish jurisdiction, the Court stated instead that the person should "reasonably anticipate being haled into court there." *Id.* at 297. The Court then stated:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98.

Notwithstanding the breadth of this "stream of commerce" language, the entire opinion indicates that the Court has not abandoned the notion that jurisdiction must rest on a person's activity *deliberately directed* toward the forum state. The Court acknowledged that defendants must be allowed "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U.S. at 297. Echoing the same theme, the Court noted that "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson*, 357

U.S. at 253, *it has clear notice that it is subject to suit there,* and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state." *Id.* (emphasis added).

In sum, the *World-Wide Volkswagen* Court's repeated reliance upon the fact that defendants, who did not direct any of their activities toward Oklahoma, could not have anticipated being subject to the jurisdiction of Oklahoma courts, leads us to believe that we should not read the "stream of commerce" language out of context. While *World-Wide Volkswagen* has been cited for the proposition that personal jurisdiction may follow a product if it is delivered "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum state," *see, e.g., Bean Dredging Corp. v. Dredge Technology Corp.,* 744 F.2d 1081 (5th Cir. 1984), *Nelson v. Park Industries, Inc.,* 717 F.2d 1120 (7th Cir. 1983), *cert. denied,* 465 U.S. 1024 (1984), we read the holding of the case to be much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.

In *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987), the Court attempted to throw additional light on *World-Wide Volkswagen's* language that a mere placement of goods "in the stream of commerce" subjects a plaintiff to suit in any state where the goods might foreseeably cause injury, but its efforts were inconclusive. In *Asahi,* a Californian who was injured in a motorcycle accident when his rear tire tube exploded filed suit against a Taiwanese manufacturer of the tube, which in turn impleaded Asahi, a Japanese company which manufactured and supplied the tube's valve assembly. Although Asahi acknowledged that it was aware that its valve assemblies would eventually be sold on motorcycles throughout the United States, it asserted that it never expected to be subject to suit in the United States, since all of its sales flowed from Japan to Taiwan. Relying on the second prong of *International Shoe,* a unanimous Supreme Court concluded that California's assertion of jurisdiction over Asahi would be unconstitutional. It held that the assertion of such jurisdiction would

"offend traditional notions of fair play and substantial justice," taking into account the burden on Asahi to defend an American suit and California's minor interest in deciding whether Asahi would have to indemnity the Taiwanese manufacturer. *Id.* at 114. The Court also noted that the "unique burdens placed upon one who must defend oneself in a foreign legal system" counsel strongly in favor of finding no jurisdiction. *Id.* at 114, 115.

Addressing the question of whether Asahi maintained "minimum contacts" with California sufficient to satisfy the first prong of *International Shoe,* the Court produced three opinions, none of which mustered majority support. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, recognized that the language of *World-Wide Volkswagen* might be read to allow jurisdiction over *any* manufacturer which is aware that its product may be sold in the forum state. She noted, however, that some courts had rejected so broad an interpretation of *World-Wide Volkswagen,* reading it to require more of the defendant than mere knowledge of the product's entry into the forum state through the stream of commerce. She sided with those courts:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112 (O'Connor, J.). Thus, even though Asahi may have been aware that its products would be sold in California, its

lack of conduct directed specifically at California made jurisdiction in California improper under a "minimum contacts" analysis.

Justice Brennan, joined by Justices White, Marshall and Blackmun, concluded that *World-Wide Volkswagen* should not be read to require "additional conduct" beyond simply placing a product in the stream of commerce with the expectation that it will be purchased in the forum state. As Justice Brennan continued, "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J.).

Justice Stevens, the swing vote, joined Justice O'Connor's opinion except with regard to the minimum contacts issue. He refused to join that aspect of the case because it was not necessary to the decision of the Court in view of its reliance on the second prong of *International Shoe*. In addition, "even assuming that the test ought to be formulated here," Justice Stevens concluded that Justice O'Connor's opinion "misapplies [the test] to the facts of this case." *Id.* at 122 (Stevens, J.). He concluded that Asahi's conduct did rise to the level of "purposeful availment" in the state of California because of the large number of Asahi's units that ended up there. *Id.*

Our reading of *World-Wide Volkswagen* and *Asahi* is that the Supreme Court has not abandoned the *International Shoe* two-pronged test as further articulated in *Hanson* and *Burger King*. The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state. *See Hanson*, 357 U.S. at 253; *Burger King*, 471 U.S. at 475; *World-Wide Volkswagen*, 444 U.S. at 297. And if that initial test is met, a court must still determine whether the exercise of such jurisdiction would offend traditional notions of fair play and substantial justice. See *Asahi*, 480 U.S. at 113. This reading of *World-Wide Volkswagen* and *Asahi* has prior support in our jurisprudence. *See Ellicott Mach. Corp. v. John Holland Party, Ltd*, 995 F.2d 474, 477 (4th Cir. 1993) (holding that minimum contacts exist where the defendant "purposefully directs its activities toward the residents of the forum"); *see also Federal Insurance Co. v.*

Lake Shore, Inc., 886 F.2d 654 (4th Cir. 1989).[1] To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism. Such a rule would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks. Moreover, we do not believe that the holding of *World-Wide Volkswagen* takes us as far as plaintiff in this case suggests. Thus, we hold that the test to be applied in considering the reach of personal jurisdiction inquires whether (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolution of controversies as between states, and (e) the shared interests of the several states in furthering fundamental substantive social policies. *See Hanson*, 357 U.S. at 253; *Burger King*, 471 U.S. at 475; *Asahi*, 480 U.S. at 113.

With this test now at hand, we turn to the facts of this case to determine whether Maryland can constitutionally assert personal jurisdiction over Hollingsworth & Vose.

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1. Other circuits have split on the question of whether the "stream of commerce" language in *World-Wide Volkswagen* should control. *See Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (adopting Justice O'Connor's position); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990) (same); *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) (adopting Justice Brennan's position); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir.) (same), *cert. denied*, 493 U.S. 823 (1989).

III

Hollingsworth & Vose is a Massachusetts corporation with its principal place of business in Massachusetts. It has demonstrated that it had no presence in Maryland by having any office, agent, or employee there, and it had no customers in Maryland. It was not registered to do business there and directed no marketing effort or other activities toward the state. It acknowledges, however, that less than one percent of its income has derived from Maryland through Lorillard's sale of cigarettes there. Hollingsworth & Vose entered into a filter supply arrangement with Lorillard under which Hollingsworth & Vose shipped filter material to Lorillard's plants in Kentucky and New Jersey. It acknowledges that, to the extent that it sold filter material to Lorillard in Kentucky and New Jersey, it placed the product in commerce, and it did so with knowledge that Kent cigarettes manufactured with its filter material would be sold in Maryland.

Lesnick relies principally upon the language in *World-Wide Volkswagen* that a state does not violate the Due Process Clause if it asserts personal jurisdiction over a corporation "that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum State." 444 U.S. at 298. Hollingsworth & Vose concedes that if this language fully states the jurisdictional test, it is subject to personal jurisdiction in Maryland. As we have already concluded, however, *World-Wide Volkswagen's* holding is not so broad as Lesnick would have us believe, and the long-standing principles of personal jurisdiction that began with International Shoe have not been overruled. Thus, Lesnick cannot rely simply upon the "stream of commerce" logic to establish jurisdiction.

Lesnick falls back on the contention that because Hollingsworth & Vose had such a close relationship with Lorillard, Hollingsworth & Vose would be subject to jurisdiction derivatively through Lorillard's contacts. In support of her contention, Lesnick relies upon the close cooperation that existed between the two defendants by reason of the contract entered into in 1952. Under that agreement, the two jointly owned the patent to the "Micronite Filter" and agreed to share information about

technical advances in the field. The two also shared equally the costs of developing the filter, including the costs of creating manufacturing facilities, and they agreed to share any royalties they might earn from licensing the process. In addition, the price Lorillard paid for the filters was a multiple of Hollingsworth & Vose's cost, with Lorillard given a right to inspect production and financial records. Hollingsworth & Vose agreed to sell filter material for tobacco use only to Lorillard for at least the first five years of their dealings. Finally, Lorillard agreed to indemnify Hollingsworth & Vose for any liabilities arising from the harmful effects of the product. The record shows that the two companies exercised some measure of cooperation during the course of the agreement to ensure that the filter was successful.

Although this arrangement represents "additional conduct" beyond the mere sale to Lorillard of filter material,[2] it does not rise to the level of establishing jurisdiction because none of the conduct is in any way directed *toward the state of Maryland.* All of the listed contacts between Lorillard and Hollingsworth & Vose relate only to Hollingsworth & Vose's agreement to supply filters from its plant in Massachusetts to Lorillard in Kentucky and New Jersey. While the result might be different if Hollingsworth & Vose had changed production to comply with Maryland regulations or if it had set up a customer relations network there, *see Asahi,* 480 U.S. at 112 (O'Connor, J.), on the record in this case, we can discover no affirmative action by Hollingsworth & Vose rising to the level of purposeful availment. Therefore, the Maryland courts may not exercise personal jurisdiction over Hollingsworth & Vose in this case, and the judgment of the district court is affirmed.

AFFIRMED

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2. Lesnick does not contend that Lorillard and Hollingsworth & Vose engaged in a joint venture as defined by Maryland law. We understand, rather, that her allegation rests on the notion that the closeness of the corporations' activities created a *de facto* agency for jurisdictional purposes.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 18, 1994

No. 93-1820
CA-91-3427

BEVERLY LESNICK, Individually and as Personal Representative of the Estate of Stanley S. Lesnick
Plaintiff-Appellant

v.

HOLLINGSWORTH & VOSE, CO.
Defendant-Appellee

and

LORILLARD, INC.
Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, ET AL.	*	
v.	*	CIVIL NO. K-91-3427
LORILLARD, INC.	*	
and	*	
HOLLINGSWORTH & VOSE COMPANY		**MEMORANDUM AND ORDER**

For the reasons stated on January 5, 1993, by this Court during an on-the-record proceeding in chambers with counsel for all parties present, and in memoranda filed by defendant Hollingsworth & Vose Company before and after January 5, 1993, the motion of defendant Hollingsworth & Vose Company for dismissal for want of personal jurisdiction is hereby GRANTED. While the issue under the present state of the case law is a very close one, the said defendant is not in this Court's view a joint venturer of the defendant Lorillard, Inc. Rather, defendant Hollingsworth & Vose Company is an important, major, and perhaps even vital supplier of Lorillard. Still, Hollingsworth & Vose Company is not engaged directly, as is Lorillard, in bringing the alleged offending product into Maryland, or doing anything with respect to Maryland, other than supplying its product to defendant Lorillard in a state other than Maryland. Accordingly, in a separate Order of even date herewith, this Court will grant defendant Hollingsworth & Vose Company's motion under Federal Civil Rule 12(b)(2) and will enter judgment for defendant Hollingsworth & Vose Company, without prejudice.

The presently outstanding schedule in this case will continue in full force and effect as to plaintiff and defendant Lorillard, Inc.

Copies of this Memorandum and Order and of the said separate Order are today being mailed to counsel of record.

It is so ORDERED, this 13th day of April, 1993.

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, Personal Representative of the Estate of Stanley S. Lesnick, Plaintiff,	*	Civil Action No. K-91-3427
v.	*	
LORILLARD, INC. and HOLLINGSWORTH & VOSE, Defendants.	*	101 W. Lombard Street Baltimore, MD 21201 January 5, 1993

TRANSCRIPT OF IN-CHAMBERS CONFERENCE BEFORE THE HONORABLE FRANK A. KAUFMAN UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	HOWELL K. ROSENBERG, ESQUIRE MARC SELDIN ROSEN, ESQUIRE
For Lorillard, Inc.:	JAMES E. GRAY, ESQUIRE WILLIAMS S. OHLEMEYER, ESQUIRE
For Hollingsworth & Vose:	ANDREW J. McELANEY, JR., ESQ. STEPHEN J. BRAKE, ESQUIRE S. ELIZABETH EVANS, ESQUIRE
Transcription Service:	MONIQUE E. GIBSON M.E.G. TYPING & TRANSCRIPTION

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

plaintiff.

THE COURT: All right. The motion of Hollingsworth — and I'll refer to Hollingsworth and Vose just as Hollingsworth for shortcut reference purposes. This is, as I've said, a motion to dismiss the amended complaint for lack of personal jurisdiction. I would point out that the burden when such a motion is made under the case law indicates the following — just a moment.

(Brief pause.)

THE COURT: I refer you to *Reliance Field Products v. Watson,* W-A-T-S-O-N, et cetera, a Third Circuit 1982 case. 675 F.2d 587, particularly at 588, where Judge Gibbons, G-I-B-B-O-N-S, said that, of course, there are two steps to be undertaken. The initial one is whether the cause of action arises from the defendant's forum related activities or from non-forum related activities. And if the claim arises from forum related activities, whether there are no contacts, and if it is from non-forum activities whether there are in that context, sufficient contacts. When a defendant challenges personal jurisdiction, the burden is on the plaintiff to make a prima facia showing that jurisdiction exists.

The plaintiff can't simply rest on bare allegations in its complaint, rather it is obligated to come forward with sufficient proffers backed by appropriate documents. And I cite you, among other cases, to the Ninth Circuit opinion in *AMBA*, A-M-B-A, *Marketing Systems, Inc.* in 551 F.2d 787, 1977. There's a Third Circuit opinion in a case entitled *Comphaine*, C-O-M-P-H-A-I-N-E *Des*, D-E-S, *Vauxipes*, V-A-U-X-I-P-E-S, in 651 F.2d 881, 1981. And also there's an Eleventh Circuit Case, *Madira*, M-A-D-I-R-A, 916 F.2d 1510, in 1990, where the Eleventh Circuit said that prima facia case established that "the plaintiff presents enough evidence to withstand a motion for directed verdict. The district court must accept the factual elements in the complainant's proof to the extent they are uncontroverted by the defendant's affidavits with the light and all reasonable inferences in favor of the plaintiff."

Against that background, let's take a look at what appear to be the uncontroverted facts or, if not the uncontroverted facts, the facts that run most favorably in the defendant's point of view.

Hollingsworth is a Massachusetts' corporation with its principal place of business in Massachusetts. By the way, I note that there are affidavits and other materials besides the pleadings which were filed in this case so that even though this is a personal jurisdiction motion, this Court must, in effect, for purposes of the summary judgment make a motion with the inferences going in favor of the plaintiff and against the maker of the motion.

The plaintiff's cause of action arises out of allegedly negligent conduct of Hollingsworth or at least of a former subsidiary of Hollingsworth, that former sole subsidiary is named H & V – H for Harry, the & sign, the ampersand sign, V for Victor – Specialties Co., Inc. During the years from 1952 to '56, Specialties manufactured asbestos contained filter media which was sold to Lorillard for use by Lorillard in the manufacture of micronite, M-I-C-R-O-N-I-T-E, filters for Kent cigarettes. The filter media – I made a mistake there – the filter media was actually manufactured by Specialties of Massachusetts and then shipped by Specialties from Massachusetts to Lorillard's factory in two places, Louisville, Kentucky and Jersey City, New Jersey. In May of '56, Specialties ceased its production of the filter media. The plaintiff's claim arises out of the alleged use of Kent cigarettes during the 1950s in Maryland.

Now, at the time this case was brought and as of today, as I understand it, H & V, that's Hollingsworth and Vose, Hollingsworth in other words, manufactured scientific and technical papers which were sold nationwide. It doesn't have any ongoing presence in Maryland and it didn't when this case was decided, nor any other significant contacts in Maryland.

The question arises, therefore, whether H & V, either through what Specialties, its subsidiary, back in the years gone by did by way of – well, let's go back again a moment. Whether Hollingsworth's subsidiary, back in the 1950s, had sufficient contacts with Maryland so that Maryland's long-arm jurisdiction can apply, constitutionally and statutorily, and whether – or, not and whether – or whether a Hollingsworth sale of paper products today establishes those kind of contacts. The plaintiff says yes, and defendant Hollingsworth says no.

Now, I'm not going to stop very long on the facts. It's a two-part test whether the Maryland long-arm statute applies, and if so whether the federal constitutional standards are met, at a minimum. Under Maryland law, or under case law there is the Maryland long-arm statute provisions which were are going to deal with today, have been held by the Court of Appeals of Maryland to extend to their full constitutional breadth, B-R-E-A-D-T-H. There's some leading cases, of course, that we will refer to.

We go back to the linchpin case of *International Shoe*, 326 U.S. 310, 1945, which has come forward to any number of cases but I think it will suffice for the purpose of this proceeding and the present issues before the Court to be guided by the following case of *Worldwide Volkswagen*, at 444 U.S., *Helicopteros*, H-E-L-I-C-O-P-T-E-R-O-S, in 466 U.S., *Burger King*, in 471 U.S., and *Ashi*, A-S-H-I, *Metal*, in 480 U. S.

Now, another way of putting the distinction between forum contacts and other non-forum contacts if you talk in terms of what is called specific jurisdiction on the one hand and general jurisdiction on the other hand. I think that the leading cases that I just referred to, particularly *Helicopteros*, take us down that line. Counsel has cited any number of cases including opinions of this Court which apply to those principles. Where a cause of action arises out of defendant's contacts with the forum state, a court may assert specific jurisdiction.

Now, let's take a look at specific jurisdiction for a moment before we go beyond this, to general jurisdiction. In specific jurisdiction we're looking for a contact with the forum state. Now, first, let's look at the filter media. The filter media was manufactured within Massachusetts. The filter media was not sent by H & V to Lorillard in Maryland. It was sent to New Jersey. It was sent to Kentucky. It was sent by Specialties, and unless someone indicates something to the contrary I would view Specialties just as I would view Hollingsworth.

And Specialties did not advertise in Maryland. It didn't design the product specifically for the Maryland market. On the other hand, it didn't design the product apparently specifically for any particular state or local market — the entire nationwide market and the United States and/or beyond. Specialties did not

maintain an office in Maryland. Specialties wasn't licensed to do business in Maryland. Specialties didn't employ a sales agent or a distributor in Maryland.

But by selling filter media to Lorillard with the knowledge that Lorillard would sell Kent cigarettes throughout the United States, including in Maryland, it is clear that Specialties did cause its products to come into the stream of commerce and in to Maryland. The question is whether that's enough. For reasons that I will return to more detail, I believe that the case law culminating in *Ashi* is to the contrary.

Doing what Specialties did isn't an act purposely directed toward Maryland, even though Specialties knew Lorillard was selling cigarettes in Maryland. On that basis I think that the plaintiff can't prevail on the special jurisdiction. On general jurisdiction, there has to be a showing that the contacts directed toward Maryland were of a continuous and of a systematic nature and fairly extensive. And that's required in order to avoid a pending motion for fair play and substantial justice.

General advertising in trade journals, even if some of them had circulation in Maryland, isn't enough even where there's some sales through wholesalers and dealers in Maryland. And I (inaudible) Hollingsworth has no business presence in Maryland. I'm repeating now – no employees in Maryland. No office in Maryland. Was not licensed to do business in Maryland. Did no direct advertising in Maryland. Didn't design a product specifically for marketing in Maryland. Maintained no bank accounts in Maryland. No telephone listings. Derived an insubstantial portion of its revenue from the sales of the Kent cigarettes in Maryland.

It did advertise in nationally distributed publications, that is Hollingsworth did. Its product did end up in Maryland. It just had minimal contact, not sufficient under the case law that I referred to which I'll analyze in more detail with you in a few minutes.

Now, I recognize that this is a case brought individually and there's a personal representative of the estate of the plaintiff's deceased husband, and this Court accepts these allegations of fact as facts for purposes of determining this motion. Namely, that the deceased husband died after contracting mesothelioma,

M-E-S-O-T-H-E-L-I-O-M-A, which is an incurable form of cancer, caused by inhalation of asbestos particles. It's alleged that those particles caused Mr. Lesnick's death. It's alleged they were hidden in the filters of Kent cigarettes from 1952 to '56. That Hollingsworth and Lorillard, Inc., who is the other defendant in this case, or which is the other defendant in this case, were jointly assigned a patent for the filter media, the method of making the filters, and the apparatus for making filters. And their filter media was manufactured in a joint venture by Hollingsworth and Lorillard. They were the active participation and knowledge of H & V. It goes back to the participation and knowledge of Hollingsworth. Their filters were promoted nationally, distributed and sold throughout the United States including Maryland.

The plaintiff says that it recognizes all of the lack of contacts with Maryland, that there's no factory in Maryland, no registration to do business in Maryland. Even that there was no toll free number in Maryland. No employees kept in Maryland by Hollingsworth.

I think the plaintiff has every right to emphasize that the filters were specifically designed for sale to consumers throughout the United States including Maryland. And that for purposes of this motion, this Court must assume that by the time Hollingsworth removed the asbestos in 1956, more than 10 billion cigarettes had been distributed to consumers. That the Decedent Lesnick smoked the possibility of 30 asbestos-laden cigarettes per day in 1952 to '56, that he purchased and smoked a large number of Kent cigarettes and that he did it in Maryland, and that he died because the asbestos escaped through more than 43,000 of the filters into his lungs.

The agreement of February 14, 1952 between Hollingsworth and Lorillard, which is part of the record, shows that Hollingsworth held itself out as having acquired special knowledge and technique relating to the construction and manufacture of filtering materials comprising mineral products. The patent is jointly, as I said before, owned by Hollingsworth and Lorillard. The two of them mutually contracted to exploit the joint ownership of the process of the invention. They agreed to, and apparently for purposes of this motion, they figured they did

share a chain of technological improvements applicable to the packaging, emphasized their best efforts to inspire (inaudible) to distribute, and to disclose back and forth among to distribute to customers and also to disclose among the two of them everything they learned about inventions and improvements in this entire process. Costs to the inventor were equally apparently borne by the two, that is by Hollingsworth and Lorillard. They have an extensive detailed agreement with regard to having this relationship with these filters come out of Massachusetts from Hollingsworth, go to Lorillard, and be put into the manufacture of the Kent cigarettes, distributed to the fullest extent possible including in Maryland by Lorillard.

I think the plaintiff is on sound ground saying the relationship between Hollingsworth and Lorillard was not that of a raw material supplier and a purchase. Hollingsworth was compensated based on volume and was very much interested in the promotion of these sales. And the parties did jointly meet and do everything they could to work together to develop, manufacture, and sell. And Hollingsworth kept up to date on what was going on in terms of the way Lorillard was marketing and handling the Kent cigarettes. Just as apparently, Lorillard kept up on everything Hollingsworth was doing in Massachusetts in terms of the shipping to Louisville and New Jersey. There were joint press releases and so forth.

The fact remains, however, that what Hollingsworth thought of the activities was not performed by Hollingsworth in Maryland. And that Hollingsworth's contacts with Maryland were only through what Lorillard did. And Lorillard did that as Lorillard even though it did it growing out of the joint venture and the joint agreement. It still did it as Lorillard. That doesn't mean that the part played by Hollingsworth wasn't disclosed or wasn't known. Nevertheless, it was done by Lorillard.

Plaintiffs point out that Hollingsworth people visited Lorillard's facilities to keep up to date and do evaluations and worked jointly. And that Lorillard in its advertisements told of the part that was being played by Hollingsworth. From 1954, the plaintiffs say that the defendants determined, that is Hollingsworth and Lorillard, had removed the asbestos and portions of (inaudible). And that the asbestos placed in the filters by the

two defendants remained in the cigarettes up until 1956 anyway. Hollingsworth tries to say there wasn't a distant seller of a raw material which was later refined by Lorillard and incorporated into a product with which it had no familiarity. And obviously that's stated with an eye to *Ashi* (inaudible).

At one point in their written presentation, plaintiffs try to say or do say that Maryland had a manifest interest in providing a forum for addressing the wrongs committed by Hollingsworth, but no more strong than California had in their *Ashi* case. If a part of an automobile has malfunctioned and it's the fault of a manufacturer for which its distributor is dealing — and that distributor puts that product out on the market in California, California is certainly concerned. The question is whether there is sufficient contact.

What this Court's view of this motion adds up to is that this battle that plaintiff is making in this case has already been lost on the defendant's case law. And this Court as a federal district court is obliged to apply the law in this way. This argument that's made with regard to the multi-district panel announced by plaintiff does not seem to me to hold weight. The fact that the panel separated this kind of a case from the asbestos litigation docket and remanded the case to Maryland as the transferor court doesn't mean that the multi-district panel decided or indeed would have the jurisdiction to decide that Maryland would have jurisdiction, personal jurisdiction over Hollingsworth. The plaintiff chose this court as forum. The multi-district panel decided not to take the case and caused this court or any court to go outside of Maryland (inaudible) for purposes under the multi-district litigation approach. It doesn't affect the fact that the plaintiff has the burden to show the plaintiff has a right to be here in terms of personal jurisdiction.

It is true that the concurring opinions and the separate concurrences in *Ashi* do contain certain indications by those justices of how they viewed the majority opinion in the case. Some of those opinions were turning opinions and some were not. (inaudible). But what this Court must look to basically is from the various opinions.

(Brief pause.)

THE COURT: In Hollingsworth's reply memo, Hollingsworth takes the position that what the plaintiffs are really doing is trying to say that Lorillard was the agent of Specialties and/or of Hollingsworth. Therefore, what it did was something that Lorillard did as agent. It's something that could be attributed to Hollingsworth. I think the analysis of the Hollingsworth writing in objecting to that is kind of a mixed fact of law.

Now, in a letter of November 11, 1992, Mr. Rosen, on behalf of the plaintiff, said that what Hollingsworth did in its reply memo filed October 30, 1992, was to take the position that Specialties is the proper party defendant rather than Hollingsworth. Let me ask someone speaking now on behalf of Hollingsworth, were you doing that?

MR. MCELANEY: No. Your Honor. (Inaudible).

THE COURT: I don't think I read that, and if that were done. I probably wouldn't permit it, or if it were done, I would say it didn't matter because it seems to me on this basis and in this case that plaintiff has shown enough connection between Hollingsworth and Specialties, so they ought to be treated as one in the same. Is Hollingsworth taking any different position?

MR. MCELANEY: Your Honor, Andrew McElaney, for Hollingsworth and Vose. Hollingsworth is the successor by merger to Specialties.

THE COURT: So. you're settled with everything that Specialties satisfied with? Is that correct?

MR. MCELANEY: That's perhaps a little broader than I would state it, but the answer is yes.

THE COURT: I'm sure that you would be more comfortable stating it more narrowly, but isn't what I said enough? Isn't what I said true and correct?

MR. MCELANEY: Respectfully, with respect to liabilities especially, that's true, Your Honor.

THE COURT: Certainly, for purposes of this motion, that's true?

MR. MCELANEY: Absolutely, you're correct.

THE COURT: Now, the latest case of *Ashi* is just a case that's too tough in this Court's opinion for the plaintiff to get over. Justice Brennan's dissent in *Ashi*, in this Court's view, and its rejection in the position stated in it, which was rejected by

the majority, is what, in this Court's judgment, puts the plaintiff behind the eight ball in this case, and behind the eight ball in such a way that they can't recover from it. And I think what Justice Brennan concluded was that in that case, *Ashi* was aware of the entire operation of the distribution system with regard to his valve assembly. He knew what was going on in California. He didn't design or control the system, but knew all about it, and was aware of it. He benefited economically from it, knew he would benefit economically from it, and worked in close tandem with those that were between it as the producer and shipper on the one hand, and to those who were on the firing line in California putting the product right into the market. The same thing occurred in this case.

Many of us who grew up in a period when *International Shoe* and its progeny were treated in a more expansive way than they are treated today, might well, writing on a clean slate, join Justice Brennan. But this is a federal district court, ladies and gentlemen, and this Court sitting is to interpret the law as it has been decided by the Supreme Court of the United States. I note a number of cases cited by the plaintiff that are Fourth Circuit cases, but many of those cases precede not only *Ashi* but some of these other cases. This is not the only case that reach agreement with this kind that I have in this court and/or other courts.

And I may be wrong, but I really don't think that this case is very close in view with *Ashi*, particularly even when the cases preceded *Ashi*. In *Ashi*, a Japanese company manufactured tire valve assemblies in Japan, sold them to several car manufacturers, including a company in Taiwan, T-A-I-W-A-N. And those were big sales that came out of this Taiwanese company alone. And it incorporated. What it did was the assemblies it made in Taiwan, that is being the Taiwanese company, and the finished tires, which was sold throughout the world including the United States. And 20 percent of its sales in the United States took place in California. And all that was going on between '78 and '82. And in '78, in California, a driver of a motorcycle lost control of his vehicle and collided with a tractor and was killed – was severely injured and his wife, who was a passenger, was killed. He filed a product liability case in a California state court against the

Taiwanese company, and alleged inter alia, I-N-T-E-R A-L-I-A, the second word, that the accident was caused by a sudden loss of air and an infringement of the rear tire of the motorcycle. And the motorcycle tire, tube, and sealant, S-E-A-L-A-N-T, were defective. The Taiwanese company filed a cross claim seeking indemnification from the Japanese Company. The motorcycle driver settled with the Taiwanese company and the other defendants and left alive only the Taiwanese indemnity action against the Japanese company. The Japanese company claimed lack of personal jurisdiction. The Japanese company, according to the record, was fully aware that tire valve assemblies which it sold to the Taiwanese company would end up throughout the United States and California. The California state court denied the motion. The Court of Appeals in California in the appellate court reversed. And then the Supreme Court of California went back along with the trial court and said that there was personal jurisdiction. And then the Supreme Court of the United States reversed and remanded.

Justice O'Connor wrote the majority opinion and concluded that even if we assume that the Japanese company was aware that some of the valves sold to the Taiwanese company would be incorporated into cars sold in California, the Japanese company didn't take any action to — sufficient action to purposely avail itself of the California market. And that minimum contact between the Japanese company and California were not present.

That can, of course, be factually distinguished to the facts of this case. The question is whether those distinctions and differences are sufficient and have any material effect in this case. I don't think they are. She spends more time going back into the detailed facts of the *Helicopteros* and *Worldwide Volkswagen,* and even more so perhaps in the *Burger King.* And I don't think there's much that you can do with anything that's said or written in those cases, no matter how more often than frequently you pour over them. I lost track of my sentence structure. I don't think there's much more that can be said which is relevant or material than I haven't said.

Before I give plaintiff a chance to show me the errors of my way and finalize it, if I do, I'm going to give you, a response to that motion as set forth, Hollingsworth's counsel, is there anything else?